Supreme Court U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

* * *

NO. 78-841

* * *

CLAUDE H. SHEPHERD, and
EVA CHAPA SHEPHERD,

Petitioners

V.

CIRO TREVINO, FRANK C. CHAMPION,
and MARK W. WHITE,

Respondents

* * *

RESPONSE OF MARK W. WHITE, ONE OF THE RESPONDENTS, TO THE PETITION FOR A WRIT OF CERTIORARI

* * *

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* * *

Mark W. White, one of the Respondents, respectfully files this response to the Petition for a Writ of Certiorari. Subsequent to the entry of the judgment of the United States District Court on June 8, 1976 but prior to either judgment of the Court of Appeals on June 30, 1978 and October 25, 1978, respectively, White resigned to become a candidate for Attorney General of the State of Texas in which candidacy he was successful. As of January 1, 1979 he will be the Attorney General. Although, according to article 1.03 of Vernon's Texas Election Code, Mr. White, as Secretary of State, was the chief election officer of Texas at the time this suit was filed and decided in the district court, he no longer has any direct responsibility as to the enforcement of the

laws which Petitioners challenge and is presently a proper party to this suit only because Petitioners have sought recovery of damages from him.

This Respondent, in his answer filed in the district court, urged as a defense his immunity from suit as an official of the State of Texas. Petitioners do not address that question and yet it is critical in view of Respondent's present status. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975); *Procunier v. Navarette*, 98 S.Ct. 855 (1978).

CONTEST OF JURISDICTION

Although Rule 23(1)(g) of the Supreme Court Rules required Petitioners to include a statement of the basis of federal jurisdiction in the district court, and even though this Respondent challenged the district court's jurisdiction, Petitioners fail to mention jurisdiction of the district court or, for that matter, of this Court as required by Rule 23(1)(b)(iii), Supreme Court Rules.

In Plaintiffs' original complaint jurisdiction was alleged under sections 1331, 1343, 2201 and 2202 of Title 28 U.S.C. The motion to dismiss, found as the first paragraph of this Respondent's answer, asserted lack of jurisdiction of the subject matter because the complaint failed to state facts giving rise to any cause of action under the Constitution or laws of the United States within the Court's jurisdiction under section 1331; because the complaint failed to state any right, privilege or immunity of the Petitioners secured by the Constitution of the United States allegedly violated by this Respondent and, therefore, there was no cause of action stated under section 1343; because neither section 2201 nor 2202 provides jurisdiction, each requiring jurisdiction in the court on some other basis as a prerequisite to the granting of declaratory relief; because there was no diversity of citizenship between

the parties; and because no other ground of jurisdiction appeared from the complaint.

In their "Response to the Original Answer of Defendant Mark W. White, Jr.," Petitioners stated that the complaint did state a cause of action under the Constitution and laws of the United States "particularly the Fourteenth Amendment, to-wit: Defendants have denied Plaintiffs the right to vote solely because they have been probated by this Federal court," in that Petitioners' right to vote without being subjected to arbitrary or irrational limitations and their right to substantive and procedural due process were violated; in that their right to equal "probation of the law" in not being denied their franchise. As Plaintiffs' complaint seems to recognize, their cause of action, if any, must be under the Fourteenth Amendment. They ignore the fact, however, that the Fourteenth Amendment, in its section 2, specifically sanctions limitations on the right to vote for participation in crime. This was the very basis of the Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974). Therefore, a complaint filed by or on behalf of persons convicted for participation in crime and asserting a constitutional right to vote does not state a violation of any protected constitutional right and is outside the jurisdiction of the United States District Court when jurisdiction is asserted on either section 1331 or section 1343 of Title 28.

QUESTIONS PRESENTED FOR REVIEW

The only question presented in this case is whether the Texas constitutional and statutory provisions that those persons convicted of a felony are ineligible to vote are made unconstitutional by the fact that Texas has adopted a procedure whereby persons convicted of felonies and given probated sentences, upon the successful completion of their period of probation, *may* be restored to full citizenship and the right of suffrage.

Although Petitioners throughout their petition would make it seem that the Texas statute distinguishes between persons convicted in Texas and restored by Texas courts, on the one hand, and persons convicted in other jurisdictions and restored in those other jurisdictions, that simply is not true. A person convicted in the federal courts and granted a pardon may be registered as a voter and a person convicted in another state and either subjected to a procedure such as that of article 42.12, section 7 of the Texas Code of Criminal Procedure, pardoned or in some other way restored to full citizenship by the jurisdiction which convicted him, may vote.

The *Ramirez* case, supra, establishes the validity of so much of Article VI, section 1, of the Texas Constitution, and article 5.01 of Vernon's Texas Election Code, as exclude felons from the vote. Thus, all that is in question is the provision that those excluded may be restored to the right to vote by having full citizenship and the right of suffrage restored or by being pardoned. (We assume that if the federal laws did not provide for a pardon, Petitioners would question that part of article 5.01, Vernon's Texas Election Code, which authorizes the vote to those who are pardoned under Texas law).

STATEMENT OF THE CASE

As Petitioners note (and as was recognized by the district court) this is an appeal from an order of dismissal based upon the pleadings, and, therefore, the factual allegations of Petitioners' complaint must be taken as true. The statement of the case, as found in the petition for certiorari, however, attempts to change those facts. Petitioners alleged in their complaint (Paragraph XXV):

> Ninety percent of all individuals placed on probation in Hidalgo County, after being convicted of a felony in the Texas state courts, upon successful completion of probation, regain their civil rights, including the right to vote, using the above procedure.

In their brief filed as Appellants in the Court of Appeals (p. 5) Petitioners alleged:

> Through Article 42.12, Section 7, of the Texas Code of Criminal Procedure ninety percent (90%) of all individuals in Hidalgo County convicted of a felony in Texas state courts, who are successful probationers, regain their right to vote . . ..

The Court of Appeals in its opinion (Petition for Certiorari, p. 5a) referring to these contentions, said:

> Plaintiffs contend that ninety percent of the successful state probationers in Hidalgo County are reenfranchised by the court in which they were convicted.

Petitioners, in their petition for rehearing and suggestion for rehearing en banc filed in the Court of Appeals did not except to that construction of the record but rather agreed with it, saying in Footnote 2 on page 5:

> The Shepherds' allegation that 90% of successful probationers in Hidalgo County are reenfranchised certainly approaches the "routineness" sought in Footnote 6 to this Court's opinion . . .. The record does not indicate which 10% are not reenfranchised (perhaps only second or third-time probationers). Nor does the record indicate what percentage of successful probationers apply for the franchise (which is the heart of the Shepherds' claim) but are among the 10% denied . . ..

Now, for the first time, Petitioners would assert and have this Court believe that the allegation really means that 90% of all probationers successfully complete their probation and that of that 90% all are routinely reenfranchised (Petition, p. 5-6 and Fn. 2, pp. 6-7). Parenthetically, the "form order" to which reference is made in Footnote 2, at p. 7, and which is appended to the petition at p. 26a is a document which we have never seen before, is not in the record and is not properly before the Court.

We would also add to the Statement of the Case as it appears in the petition that the prayer of Petitioners' complaint was that the district court enter its judgment certifying this action as a class action; declaring that article 5.01(4) of the Texas Election Code and article 42.12, section 7, Vernon's Texas Code of Criminal Procedure, operating together, violate the guarantee of equal protection of the United States and Texas Constitutions; alternatively, that the lack of a provision for a procedure similar to article 42.12 applicable to felons convicted and probated under federal law violated the guarantee of equal protection; granting preliminary and permanent injunctions restraining Respondents from denying voter registration to Petitioners and their class due to past felony convictions; granting Petitioners judgment in the amount of $11,000 actual damage; retaining jurisdiction to ensure compliance and granting Petitioners their costs. In their response to this Respondent's answer, however, Petitioners said:

> Plaintiffs have not prayed that the Court declare Article 42.12, Section 7, of the Texas Code of Criminal Procedure unconstitutional.

NO REASON EXISTS FOR GRANTING A WRIT OF CERTIORARI

No special or important reason exists for the exercise

of this Court's discretion and granting of the writ of certiorari. Rule 19(1)(b) of the Rules of the Supreme Court states guidelines which "indicate the character of reasons" that this Court will consider in making that determination. Apparently Petitioners rely on that part which states that among the reasons that will be considered is

> Where a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court . . .

They cite *O'Brien v. Skinner*, 414 U.S. 524 (1974); and *Carrington v. Rash*, 380 U.S. 89 (1965). It may be significant that neither of these decisions was cited by Petitioners in the district court or the court of appeals and the arguments presented by Petitioners as reasons for granting the writ are arguments not urged before the lower courts and upon which the lower courts have not expressed themselves.

Be that as it may, neither case conflicts with the decision of the Court of Appeals. *O'Brien* dealt with the right of persons detained in the county jail of the county of their residence and awaiting trial or serving misdemeanor sentences to vote absentee, denied by the New York statute, as compared to similar detainees in counties other than the county of their residence who were permitted to vote absentee. The qualification of the detainees as voters was not in question. The Court said:

> . . . Appellant and others similarly situated are, as we have noted, under no legal disability impeding their legal right to register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote.

(414 U.S. at 530).

In *Carrington v. Rash* the question was whether the State of Texas could deny to residents of the state otherwise qualified to vote the right to vote merely because they were military personnel.

Neither *O'Brien* nor *Carrington* dealt with the right of the State of Texas to except from its general, constitutional denial of the franchise to convicted felons those who had been found by a court to be proper candidates for having their civil rights restored. Thus, the conflict upon which Petitioners would predicate this Court's exercise of its discretion to grant a writ of certiorari simply does not exist.

Petitioners complain because a felony, under Texas law, differs from a felony under federal law. There are many differences between federal criminal law and Texas criminal law. The jurisdictions of the courts differ. The procedures differ. The possible ranges of punishment differ. The places of punishment are different. The provisions for probation are different. The rights to a pardon differ. Apparently, Petitioners would have the Court find that the Texas constitutional inhibitions on those who may vote can only be applied to persons convicted under statutes, procedures and circumstances identical to those under which Texas felons might be convicted.

As we have previously noted, Petitioners would change the facts upon which the motion to dismiss was sustained and substitute new facts with reference to what percentage of those convicted of felonies were given probated sentences, how many of them successfully completed their probation, and how many of those successfully completing probation were released from all penalties and disabilities resulting from their conviction under article 42.12, section 7, of the Texas Code of Criminal Procedure. They also would have the Court believe that only a felon released of the

penalties and disabilities resulting from his conviction under that article, that is under Texas law, could enjoy the provisions of article 5.01 of the Election Code. There is no law to support this contention and the article certainly is subject to the interpretation that any convicted felon, whether convicted in Texas or elsewhere, who through some procedure of the convicting jurisdiction is restored to full citizenship and the right of suffrage may exercise those rights in Texas if he meets the other requirements of citizenship.

The petition for certiorari makes no mention of the relief sought here. The relief sought by the complaint is vague and indefinite and understandably so. Petitioners say they do not question the constitutionality of article 42.12, section 7. Surely they don't question the constitutionality of article 5.01 of the Election Code--they seek to take advantage of its provisions. What, then, *is* the relief which they seek? Several alternatives seem to be available.

If Petitioners are correct, then the Court could equalize the treatment of convicted felons by striking down that portion of article 5.01 which would permit certain convicted felons who had successfully completed their period of their probation and had been released from the penalties of their conviction under article 42.12, section 7, to vote. Or, the Court could order that, somehow, the Texas state courts would administer the federal probation system and perform for federal felons the function they now perform for state felons. Or, the Court could order that the federal courts apply the state procedures of article 42.12, section 7, to federal felons. Or, the Court could order establishment of a panel, independent of the courts, to review both state and federal cases and determine which convicted felons would be released of the penalties of their conviction. Or, the Court could order that all felons, both state and federal, be automatically reenfranchised upon

satisfactory fulfillment of the terms of probation without reference to other factors which might now bear upon the application to them of section 7. All of these were considered by the district court in its memorandum and order (Petition for Certiorari, p. 22a) and rejected by it as being properly subject to legislative and not judicial consideration. These were also considered in the opinion of the Court of Appeals (Petition for Certiorari, pp. 12a-13a) and rejected by it.

Assuming that even Petitioners will not urge that the purpose of the Texas scheme for reenfranchising certain ex-convicts is bad in principle, then it seems that no purpose is to be served by this Court granting a writ of certiorari to review that scheme.

For the foregoing reasons, Respondent Mark White respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response of Mark W. White, One of the Respondents, to the Petition for a Writ of Certiorari has been placed, postage prepaid, in the United States First Class Mail on this the ___ day of December, 1978 addressed to the following:

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